

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF OKLAHOMA**

<b>RANDALL DALE SPEER,</b>	)	
	)	
<b>Petitioner,</b>	)	
	)	
<b>v.</b>	)	<b>CIV-05-691-R</b>
	)	
<b>MARTY SIRMONS,</b>	)	
	)	
<b>Respondent.</b>	)	

**ORDER**

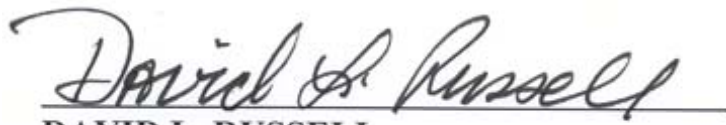
Before the Court are the Report and Recommendation of United States Magistrate Judge Doyle W. Argo entered July 28, 2005 and Petitioner's Objection to the Report and Recommendation filed August 15, 2005. Pursuant to 28 U.S.C. § 636(b)(1)(B), the Court reviews those aspects of the Report and Recommendation to which Petitioner objects *de novo*. In this case, Petitioner objects to the entire Report and Recommendation and, in particular, objects to the Magistrate Judge's failure to toll the one-year statute of limitations until February 23, 2005, when the Oklahoma Court of Criminal Appeals dismissed Petitioner's appeal from the denial of his application for post-conviction relief for lack of jurisdiction based upon the untimely filing of his appeal. Therefore, the Court reviews the entire Report and Recommendation *de novo*.

The Court has carefully reviewed the pleadings in this case, the Report and Recommendation and Petitioner's Objection to the Report and Recommendation. The Court fully concurs in the findings and conclusions of the Magistrate Judge on the statute of limitations, statutory tolling, equitable tolling and the failure of the petition to state a claim

for federal habeas relief predicated on post-conviction procedures which resulted in the dismissal of his post-conviction appeal. In particular, the Court agrees that because Petitioner's post-conviction appeal was not timely filed, it was not "properly filed" within the meaning of 28 U.S.C. § 2244(d)(2), and the period in which the untimely appeal remained pending until the Oklahoma Court of Criminal Appeals dismissed it as untimely, on February 23, 2005, is not counted for tolling purposes, i.e., the statute of limitations was not tolled during that period. *See Gibson v. Klinger*, 232 F.3d 799, 804 (10<sup>th</sup> Cir. 2000); *Hoggro v. Boone*, 150 F.3d 1223, 1227 n. 4 (10<sup>th</sup> Cir. 1998).

In accordance with the foregoing, the Report and Recommendation of the Magistrate Judge is ADOPTED in its entirety and the petition herein for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 is DISMISSED upon filing as untimely.

**IT IS SO ORDERED this 16<sup>th</sup> day of August, 2005.**

  
DAVID L. RUSSELL  
UNITED STATES DISTRICT JUDGE